

## REMARKS

Claims 1-12 are pending. Claims 1, 6, and 9 were rejected under 35 U.S.C. § 112, first paragraph. Claims 1 and 6 were rejected under 35 U.S.C. § 112, second paragraph. Claims 1-12 were rejected as anticipated by U.S. Patent No. 5,387,440 to Kunz et al.

Applicant respectfully disagrees with the rejections for the reasons set forth below.

### Rejections Under 35 U.S.C. § 112, first paragraph:

The Office Action asserted that Claims 1 and 6 are not enabled because one of ordinary skill in the art would not be able to prepare and/or use the invention, because the specification does not provide any guidance as to how to prepare “a layer of metallized polyester” as recited in the claims. Applicant respectfully disagrees. A patent need not teach, and preferably omits, what is well known in the art. *In re Buchner*, 18 USPQ2d 1331, 1332 (Fed. Cir. 1991). See MPEP § 2164.01. Metallization of polymer films is very well known in the art, as is the term “metallized” when applied to such films. See, for instance, U.S. Patent No. 5,209,972 (cited in Applicant’s Information Disclosure Statement) at column 1, lines 56-67, which explains that metallization comprises the deposition (e.g., by a vapor deposition technique) of a thin layer of metal (not metal oxide) on the surface of the film such as PET (a polyester) to serve as a barrier to transmission of gases. Thus, the term “metallized polyester” and the corresponding structure are known in the art, as is the process for preparing the structure.

Applicant respectfully submits, therefore, that the present specification need not teach how to make a metallized polyester layer. The rejections of Claims 1 and 6 under 35 U.S.C. § 112, first paragraph, should be withdrawn. Furthermore, the broad interpretation of “metallized polyester” as including polyester with metal-containing compounds (such as aluminum oxide) deposited on the surface is contrary to the accepted meaning of the term in the art, as exemplified

for instance by the '972 patent as noted above. Applicant respectfully requests that the patentability of the claims be reconsidered in a manner consistent with the art-accepted meaning of the term "metallized" as explained above.

The Office Action also rejected Claim 9 for lack of enablement because the specification does not describe what compounds comprise "retortable lacquer" as recited in the claim. Applicant submits persons skilled in the art would understand from the specification that a "retortable lacquer" is a lacquer capable of withstanding a retort process. Such lacquers are well known to persons of ordinary skill in the art and therefore need not be described in detail in the application.

Accordingly, it is respectfully submitted that the inventions defined by Claims 1, 6, and 9 are enabled and the rejections under 35 U.S.C. § 112, first paragraph, should be withdrawn.

Rejections Under 35 U.S.C. § 112, second paragraph:

Claims 1 and 6 were rejected as being indefinite because the Office Action asserted the term "metallized" is indefinite. Applicant submits, on the contrary, that the term has a well-known meaning in the art, as already explained, and that the term is sufficiently definite to allow others to ascertain the scope of the term with reasonable certainty. This is all that is required, and therefore the rejections of Claims 1 and 6 under 35 U.S.C. § 112, second paragraph, should be withdrawn.

Rejections Based on Kunz et al.:

The Office Action asserted that Kunz discloses a non-foil-based retort packaging structure that includes a layer of metallized polyester. This conclusion is evidently based on the broad interpretation of the term "metallized" as including the deposition of any metal-containing

compound on the polyester. Kunz discloses a polyester layer having a coating of a ceramic such as aluminum oxide; therefore, according to the Office Action, Kunz discloses a "metallized" polyester layer.

As should be apparent from the foregoing discussion, the provision of a ceramic coating does not constitute "metallization" of the polyester within the well-known meaning of that term in the art. Aluminum oxide is entirely different in chemical structure and mechanical properties from the non-oxide form of metal deposited in metallization. Indeed, in the background of the present specification it is noted that prior retort structures employing aluminum oxide coatings are prone to flex cracking when the structure is formed into a stand-up pouch. Such flex cracking is due to the brittle nature of ceramics such as aluminum oxide. The pure form of metal employed in metallization is not brittle.

In view of the difference between aluminum oxide coatings and metallization, it is respectfully submitted that Kunz does not anticipate the invention of Claims 1-12.

Finally, the Office Action gave little to no patentable weight to the additional features of Claims 4 and 9 on the basis that they constitute method limitations. Although Applicant disagrees, these claims have been amended to recast the limitations in apparatus form.

### Conclusion

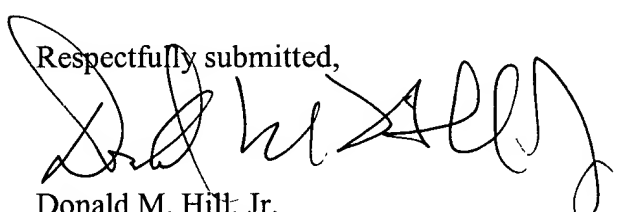
Based on the above amendments and remarks, it is submitted that the application is in condition for allowance. The Examiner is invited to telephone the undersigned if there are any remaining issues requiring resolution before a Notice of Allowance can be issued.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of

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this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,



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**Version with Markings to Show Changes Made:**

**In the Claims:**

4. (Amended) The flexible non-foil-based retort packaging structure of claim 1, [wherein the layer of polyester is] further comprising ink printed [with ink] on the side of the layer of polyester that faces the layer of metallized polyester.

9. (Amended) The flexible non-foil-based retort packaging structure of claim 6, [wherein the layer of metallized polyester is] further comprising ink printed [with ink] on the layer of metallized polyester on an opposite side thereof from the layer of cast polypropylene, and [the ink is then covered with] a layer of a retortable lacquer covering the ink.

12. (Amended) A flexible non-foil based retort package, comprising at least two opposing portions of the packaging structure of claim [2] 6 having peripheral edge portions of the opposing portions heat-sealed together so as to form a pouch configuration.